Supreme Court, U.S.
FILED
NOV 2 3 2004
OFFICE OF THE CLERK

No. 03-388

IN THE

Supreme Court of the United States

DENNIS BATES, *et al.*,

Petitioners,

v.

DOW AGROSCIENCES LLC,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF FOR AMERICAN CHEMISTRY COUNCIL AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Richard O. Faulk
Counsel of Record
Diana L. Panian
Gardere Wynne Sewell LLP
1000 Louisiana, Suite 3400
Houston, Texas 77002-5007
(713) 276-5500

Counsel for Amici Curiae
American Chemistry Council

November 2004

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1
SUMMARY OF ARGUMENT 2
ARGUMENT 4
SINCE PETITIONERS' CLAIMS CANNOT BE EVALUATED APART FROM THE EFFICACY OF RESPONDENT'S WARNINGS AND INSTRUCTIONS, THEIR ILLUSORY "DESIGN DEFECT" CLAIMS ARE PREEMPTED BY FIFRA 4
CONCLUSION 14

TABLE OF AUTHORITIES

Page

Akee v. Dow Chem. Co.,
272 F. Supp. 2d 1112 (D. Haw. 2003) 10, 13

Allen v. Long Mfg. NC, Inc.,
322 S.C. 422, 505 S.E.2d 354 (S.C. Ct. App. 1998) 8

Andrus v. AgrEvo USA Co.,
178 F.3d 395 (5th Cir. 1999) 11, 12

Arnold v. Dow Chem. Co.,
110 Cal. Rptr. 2d 722 (Cal. Ct. App. 2001) 13

Bojorquez v. House of Toys, Inc.,
62 Cal. App. 3d 930 (Cal. Ct. App. 1976) 8

Cassisi v. Maytag Co.,
396 So. 2d 1140 (Fla. Dist. Ct. App. 1981) 8

Cook v. Branick Mfg., Inc.,
736 F.2d 1442 (11th Cir. 1984) 8

Dow Chem. Co. v. Ebling,
723 N.E.2d 881 (Ind. Ct. App. 2000), *aff'd in part, rev'd in part*, 753 N.E.2d 633 (Ind. 2001) 13

Eriksen v. Mobay Corp.,
41 P.3d 488 (Wash. Ct. App. 2002) 13

Ferguson v. F.R. Winkler GMBH & Co. KG,
79 F.3d 1221 (D.C. Cir.), *cert. denied*, 519 U.S. 949 (1996) 8

Gauthier v. AMF, Inc.,
788 F.2d 634 (9th Cir. 1986) 7

Haddix v. Playtex Family Prods. Corp.,
138 F.3d 681 (7th Cir. 1998) 13

Hansen v. Sunnyside Prods., Inc.,
55 Cal. App. 4th 1497 (1997) 8

Jarrell v. Monsanto Co.,
528 N.E.2d 1158 (Ind. Ct. App. 1988) 8

Leachman v. Beech Aircraft Co.,
694 F.2d 1301 (D.C. Cir. 1982) 8

Lescs v. Dow Chem. Co. ("Lescs I"),
976 F. Supp. 393 (W.D. Va. 1997), *aff'd sub nom* 168 F.3d 482 (4th Cir. 1999) 13, 14

Lescs v. William R. Hughes, Inc. ("Lescs II"),
168 F.3d 482, 1999 WL. 12913 (4th Cir. 1999) 13

MacDonald v. Monsanto,
27 F.3d 1021 (5th Cir. 1994) 12

Marshall v. Clark Equip. Co.,
680 N.E.2d 1102 (Ind. Ct. App. 1997) 8

Oken v. Monsanto Co.,
218 F. Supp. 2d 1361 (S.D. Fla. 2002) 10, 13

Papike v. Tambrands, Inc.,
107 F.3d 737 (9th Cir. 1997) 7, 13

Reece v. Good Samaritan Hosp.,
953 P.2d 117 (Wash. Ct. App. 1998) 14

Ruiz-Guzman v. Amvac Chem. Corp.,
243 F.3d 549, 2000 WL 1763212 (9th Cir. 2000) 13

Shell Oil Co. v. Harrison,
425 So. 2d 67 (Fla. Dist. Ct. App. 1982) 8

Temple v. Velcro USA, Inc.,
148 Cal. App. 3d 1090 (1983) 7

Tillman v. R.J. Reynolds Tobacco Co.,
871 So. 2d 28 (Ala. 2003) 8

Vitanza v. Upjohn Co.,
778 A.2d 829 (Conn. 2001) 8

Worm v. American Cyanamid Co.,
5 F.3d 744 (4th Cir. 1993) 11, 12

STATUTES

7 U.S.C. 136 *et seq* 4

H.R. *Rep.* No. 100-939, at 26 (1988),
reprinted in 1988 U.S.C.C.A.N. 3474, 3475 4

Texas Civ. Prac. & Rem § 82.005 (Vernon Supp. 2004) 9

MISCELLANEOUS

Restatement (Second) of Torts, § 402A,
(1965) 7

Restatement (Third) Torts: Prods. Liab., § 2 (1998) 9

Morton F. Daller, Product Liability Desk Reference,
A Fifty State Compendium (2004 ed.) 5

M. Stuart Madden, 1 Products Liability § 8.3 (2d ed. 1988) 9

STATEMENT OF INTEREST*

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. Council members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. These products include pesticides and herbicides. The business of chemistry is a $460 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

The ACC is very interested in the questions presented by this case. Members of the ACC include herbicide and pesticide manufacturers who are regulated by the Environmental Protection Agency and the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). Like Respondent, members of the ACC provide their pesticide and herbicide labels to the EPA for approval. Once the EPA approves the label, the warnings and instructions for these products are deemed adequate as a matter of law under FIFRA. As such, this Court's ruling on the preemption of Petitioners' claims by FIFRA against Respondent will have a large impact on the members of the ACC.

---

*Pursuant to Rule 37.6, *amici* state that no counsel for any party authored any part of this brief. No person or entity, other than *amici*, made a monetary contribution toward the preparation or submission of this brief, which is filed with the parties' written blanket consent.

SUMMARY OF ARGUMENT

This amicus brief addresses a single issue raised by this proceeding, namely, whether the Fifth Circuit correctly held that Petitioners' "design defect" claims are properly preempted by FIFRA. The resolution of this issue is important to the ACC and its members, not only because they include manufacturers of pesticides and herbicides governed by FIFRA, but also because of the singular nature of chemical products and the way in which they may – and may not – be subject to tort liability.

In particular, it is the ACC's position that chemical products that conform to manufacturers' specifications can be found "unreasonably dangerous" only in the absence of adequate warnings and precautionary instructions. Because the manufacturers' warnings and instructions in this matter were adequate as a matter of law pursuant to federal approval, and because all other claims were preempted by FIFRA, the Fifth Circuit's judgment should be affirmed.

Chemicals are unique products — they "are what they are." Unlike machines or tools, chemical products are not merely assemblies of discrete components. Instead, chemicals are singular entities -- unique in themselves. Their elements and molecules are locked together by natural laws, not by nuts and bolts, and breaking chemical bonds does not merely "change" products – it actually transforms them into something completely different. Thus, it is impossible to "improve" a chemical product's "design" without producing a different product and vitiating the unique character of the original.

The nature of chemical products may be illustrated by referring to naturally occurring chemical compounds. For example, although carbon dioxide is not ordinarily toxic as

humans encounter it in everyday life, carbon monoxide is a deadly toxin. There is nothing "defective" in the "design" of carbon monoxide merely because it has one less oxygen molecule in its formula. Instead, what is needed is an adequate warning of its toxicity and adequate precautionary instructions to protect users from those dangers. When that information is provided, the dangers that are intrinsic to the compound's nature are not deemed "unreasonably dangerous."

The same principles apply to manufactured chemical products. Such materials may differ in their formulas and may have varying effects at varying doses and in varying applications. Yet merely because a manufactured chemical, such as a herbicide, has certain risks associated with its intended use does not mean that it is "defectively designed." Rather, the inherent risks associated with the compound's usage must be addressed by adequate warnings and instructions. In that way, the potential dangers associated with the chemical can be eliminated.

These principles are especially important in this action. Here, Petitioners contend that a herbicide, manufactured precisely according to the manufacturer's specifications, was "defectively designed" because it proved dangerous to crops when applied to soils of a particular character. Petitioners make this argument not because the product did not do what it was designed to do – namely, kill vegetation – but rather because the product did exactly what it was designed to do. To the extent that the product was unsuitable for use in certain soils, that "problem" does not arise from the product's "design," but rather from Petitioners' failure to appreciate the extent of the product's dangers and the precautions necessary to avoid them.

Petitioners' contentions are no more than disguised claims that Respondent failed to provide adequate warnings and instructions to alert Petitioners of certain dangers and the methods by which those dangers could be avoided. Although Petitioners argue that the design frustrated their "expectations" as consumers of the product, such expectations legitimately arise only when they are based upon information provided on the product's approved label. Because Petitioners' expectations are defined by the label, they also derive from the label's sufficiency as a source of necessary information. Accordingly, Petitioners' "defective design" claims are illusory. Further, because the labeled warnings and precautions are adequate as a matter of law under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"),[1] Petitioners are precluded from challenging their adequacy as a matter of law. Hence, the Fifth Circuit properly affirmed the district court's denial of relief to Petitioners.

ARGUMENT

SINCE PETITIONERS' CLAIMS CANNOT BE EVALUATED APART FROM THE EFFICACY OF RESPONDENT'S WARNINGS AND INSTRUCTIONS, THEIR ILLUSORY "DESIGN DEFECT" CLAIMS ARE PREEMPTED BY FIFRA.

Product liability claims are creatures of state law, and the standards for evaluating "design defect" claims vary

[1] *See* 7 U.S.C. 136 *et seq*. Federal control over pesticides began with the passage of The Insecticide Act in 1910. *See* H.R. Rep. No. 100-939, at 26 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3474, 3475. The passage of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") in 1947 replaced and repealed The Insecticide Act. *See id.*

from state to state.[2] It is not the purpose of this brief to analyze exhaustively whether Petitioners have stated a cause of action under any particular state's law. Rather, this brief is filed to address the arguments Petitioners raise to evade FIFRA's preemptive sweep.

Fundamentally, the resolution of this case hinges upon whether Petitioners can avoid FIFRA preemption by characterizing their claims as "defective design" causes of action, instead of as "failure to warn" claims that are plainly preempted. Petitioners argue that when a chemical product, such as a herbicide, is sold into the stream of commerce, consumers of that product have certain "expectations" regarding the product's efficacy and safety for its intended use. When a product fails to satisfy those "expectations" and causes harm, Petitioners assert that the product is "defectively designed" because its formulation is inconsistent with safe usage under foreseeable circumstances. Stated another way, Petitioners claim that the product's "risks" are allegedly outweighed by its "benefits."

In Petitioners' view, there are no meaningful distinctions between a "design defect" claim involving a chemical product and claims based upon defects in other types of products, such as machinery or tools. If a chemical product's formulation presents an unreasonable danger to persons or property in its foreseeable uses, the chemical is "defectively designed" and the manufacturer is subject to strict liability irrespective of the presence of adequate warnings and instructions. In this way, Petitioners seek to avoid FIFRA preemption by casting their claims as something other than claims based upon "failure to warn."

[2] *See generally,* Morton F. Daller, PRODUCT LIABILITY DESK REFERENCE, A FIFTY STATE COMPENDIUM (2004 ed.).

These arguments are fatally flawed because they ignore the confluence between the fundamental characteristics of chemical products and the necessity of considering the impact of adequate warnings in the context of "design defect" cases. Chemicals are unique products — they "are what they are." Unlike machines or tools, chemical products are not merely assemblies of discrete components. Instead, they are singular entities -- unique in themselves. Their elements and molecules are locked together by natural laws, not by nuts and bolts, and breaking chemical bonds does not merely "change" change products – it actually transforms them into something completely different. Thus, it is impossible to "change" or "improve" a chemical product's "design" without producing a different product and vitiating the unique character of the original. Accordingly, the adequacy of product warnings and instructions is the sole issue typically relevant in a chemical product liability case.

The nature of chemical products may be illustrated by referring to naturally occurring chemical compounds. For example, although carbon dioxide is not ordinarily toxic as humans encounter it in everyday life, carbon monoxide is a deadly toxin. Yet carbon monoxide is not "defectively designed" because it has one less oxygen molecule in its formula. Instead, what is needed is an adequate warning of its toxicity and adequate precautionary instructions to protect users from those dangers. When that information is provided, the dangers that are intrinsic to the compound's nature are not deemed "unreasonably dangerous."

The same principles apply to manufactured chemical products. Such materials may differ in their formulas and may have varying effects at varying doses and in varying applications. Yet merely because a manufactured chemical,

such as a herbicide, has certain risks associated with its intended use does not mean that it is "defectively designed." Rather, the inherent risks associated with the compound's usage must be addressed by adequate warnings and instructions. In that way, the potential dangers associated with the chemical can be eliminated – and liability for injuries resulting from its foreseeable uses can be avoided.

These principles are especially important in this action. Whether a state court proceeds under a "consumer expectations" or "risk/utility" analysis, or whether the question hinges on the availability of an alternative "safer design," the adequacy of warnings and instructions is an indispensable element of applying strict liability principles to chemical products. Under comment j of the Second Restatement of Torts,[3] considerations of the "design" of a product and its allegedly defective nature cannot be divorced from the warnings and instructions that accompany it. In fact, the thrust of comment j is that legally adequate warnings and instructions negate liability for allegedly defective designs as well as implied warranty claims.[4] Hence, "an adequate warning will make the product not unreasonably dangerous, thereby eliminating an essential

---

[3] RESTATEMENT (SECOND) OF TORTS, § 402A, Cmt. j (1965).

[4] *See, e.g., Gauthier v. AMF, Inc.*, 788 F.2d 634, 635 (9th Cir. 1986)(Construing Montana law and holding "where adequate warnings are given, a product is neither defective nor unreasonably dangerous."). *See also Papike v. Tambrands, Inc.*, 107 F.3d 737, 744 (9th Cir. 1997) ("[T]he legally-adequate warnings . . . foreclosed Papike's claims for breach of warranty. The claim for punitive damages obviously fails as well."); *Temple v. Velcro USA, Inc.*, 148 Cal. App. 3d 1090, 1094 (1983) ("An adequate warning is a sufficient defense to a strict liability action. . . . If the warning was adequate it certainly . . . would also negate any negligence or willful misconduct.") (citations omitted).

element within the definition of strict liability."[5] Since FIFRA makes the legal adequacy of Respondent's warnings incontestable, Petitioners right to pursue a "design defect" claim under the Second Restatement is conclusively negated. Even if liability is not precluded directly, liability is

[5] *Jarrell v. Monsanto Co.*, 528 N.E.2d 1158, 1167 (Ind. Ct. App. 1988), *transfer denied*, 555 N.E.2d 453 (Ind. 1990) (original emphasis); *see also Ferguson v. F.R. Winkler GMBH & Co. KG*, 79 F.3d 1221, 1226 (D.C. Cir.), *cert. denied*, 519 U.S. 949 (1996) (citations omitted)("Much relevant precedent confirms that the presence of warnings may transform an otherwise unreasonably dangerous design, even as compared to other designs, into a safe one."). "When proper warnings are attached to such products, they are excepted from the Restatement's standard of defectiveness." *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1145 n.4 (Fla. Dist. Ct. App. 1981). *See also Bojorquez v. House of Toys, Inc.*, 62 Cal. App. 3d 930, 933 (1976) ("[T]he manufacturer of an unreasonably dangerous product may insulate himself from strict liability by adding a warning or giving directions on the container which keep the product from being deemed unreasonably dangerous."); *Tillman v. R.J. Reynolds Tobacco Co.*, 871 So.2d 28, 32 (Ala. 2003) ("[D]anger may be obviated by an adequate warning."); *Vitanza v. Upjohn Co.*, 778 A.2d 829, 836 (Conn. 2001) ("Proper warnings, however, may prevent a product from being unreasonably dangerous."); *Allen v. Long Mfg. NC, Inc.*, 322 S.C. 422, 505 S.E.2d 354, 357 (Ct. App. 1998) ("[A] seller may prevent a product from being unreasonably dangerous if the seller places an adequate warning on the product regarding its use."); *Hansen v. Sunnyside Prods., Inc.*, 55 Cal. App. 4th 1497, 1515 (1997) ("[C]onsideration of warnings . . . potentially permits the defendant to escape liability because of the low likelihood of harm."); *Cook v. Branick Mfg., Inc.*, 736 F.2d 1442, 1446 n.3 (11th Cir. 1984) ("[D]anger may be obviated by an adequate warning"); *Marshall v. Clark Equip. Co.*, 680 N.E.2d 1102, 1106 (Ind. Ct. App. 1997) ."), *transfer denied*, 698 N.E.2d 1186 (Ind. 1998)("[A] manufacturer may avoid liability by placing adequate warnings on a product even when there is evidence of a 'safer' alternative design; *Leachman v. Beech Aircraft Co.*, 694 F.2d 1301, 1306 (D.C. Cir. 1982) ("[T]he presence of warnings can cure the unreasonable danger."); *Shell Oil Co. v. Harrison*, 425 So. 2d 67 (Fla. Dist. Ct. App. 1982), *rev. denied*, 436 So. 2d 98 (Fla. 1983) (EPA-accepted product label for pesticide sold in bulk was adequate as a matter of law, thereby defeating claims for strict products liability and negligence).

nevertheless extinguished because "design" liability is inextricably intertwined with the adequacy of Respondent's warnings and instructions.

Although the Third Restatement retreats from the view that an adequate warning inevitably trumps a design defect claim,[6] it still acknowledges that "[r]easonable . . . instructions or warnings . . . play important roles in the production and distribution of reasonably safe products." [7] Further, comment f specifically states that "the warnings and instructions accompanying the product, and the nature and strength of consumer expectations regarding the product" are factors to be weighed in the "design defect" analysis.[8]

In cases involving chemical products, the issue of warnings is dominant because the Third Restatement insists upon proof of an alternative "safer design" as a prerequisite to a finding that the product's "design" is defective.[9] Since

[6] RESTATEMENT (THIRD) TORTS: PRODS. LIAB., § 2 cmt l (1998).

[7] *Id.*

[8] *Id.* Cmt. f.

[9] *Id.* at § 2(b)(A product "is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe."). Significantly, this requirement has been codified by statute under Texas law, the substantive law that governs the viability of Petitioners' claim here. *See* TEX. CIV. PRAC. & REM. CODE 82.005 (Vernon Supp. 2004). The Texas rule is consistent with the standard for finding "design defect" in the majority of other jurisdictions. *See* M. Stuart Madden, 1 PRODUCTS LIABILITY § 8.3, at 299 (2d ed. 1988) ("[T]he majority rule posits that plaintiff cannot establish a prima facie case of defective design without evidence of a technologically feasible, and practicable,

no "safer design" can be devised without transforming the chemical into a different compound, product liability claims involving chemical products can only be resolved by evaluating the adequacy of the manufacturers' warnings and precautionary instructions. Since warnings must be considered in any "design defect" calculus – regardless of which Restatement's standards are applied – all roads inexorably lead to FIFRA preemption.[10]

Here, Petitioners contend that a herbicide – manufactured precisely according to the manufacturer's specifications – was "defectively designed" because it proved dangerous to crops when applied to soils of a particular character. Petitioners make this argument not because the product did not do what it was designed to do – namely, kill vegetation – but rather because the product did exactly what it was designed to do. To the extent that the product was unsuitable for use in certain soils, that "problem" does not arise from the product's "design," but rather from Petitioners' failure to appreciate the extent of the product's dangers and the precautions necessary to avoid them.

---

alternative to defendant's product that was available at the time of manufacture.").

[10] *See Akee v. Dow Chem. Co.*, 272 F. Supp. 2d 1112, 1132 (D. Haw. 2003) ("Plaintiffs are precluded from proving a strict liability design defect claim based on Hawaii's articulation of the risk-utility test, because such a claim is preempted by FIFRA."). *See also Oken v. Monsanto Co.*, 218 F. Supp. 2d 1361, 1366-67 (S.D. Fla. 2002)), *aff'd*, 371 F.3d 1312 (11th Cir. 2004)(FIFRA preempts Florida's risk/utility and consumer expectation tests for design defect). In the interest of brevity, the ACC does not provide an exhaustive analysis of the arguments supporting FIFRA preemption generally. The ACC presumes that the parties and other *amici* will address those arguments thoroughly in their own respective briefs.

As a result, Petitioners' "defective design" claims necessary depend upon a finding that the warning on the federally approved label was absent or inadequate. Since the "problem" alleged by Petitioners does not concern the efficacy of the product itself, but rather the lack of sufficient information to inform them of its alleged dangers, it necessarily derives from a "failure to warn" claim. Indeed, it seems clear that the "problem" can be "solved" merely by changing the label, which Respondent actually did when it secured approval for a supplemental label thereafter.[11]

If modifying the label is curative, as seems plain here, Petitioners' claims must be construed to challenge the sufficiency of the original label. Such a claim has nothing to do with the product's "design" – and everything to do with the alleged failure of the label to provide enough information to prevent their injuries. Although the line between mislabeling and a claim for a defective product has been described as "razor thin," the resolution turns upon "whether one could reasonably foresee that the manufacturer, in seeking to avoid liability for the error, would choose to alter the product or the label."[12] Of course, such an alteration actually occurred in this matter, illustrating Petitioners' error

---

[11] Respondent successfully petitioned the EPA for permission to issue a supplemental label for use in 2001. J.A. 179. The supplemental label provided more specific instructions for soils with pH levels of 7.2 or higher, stating: "Do not apply Strongarm to soils with a pH of 7.2 or greater." J.A. 181.

[12] *Worm v. American Cyanamid Co.*, 5 F.3d 744, 747 (4th Cir. 1993); *see also Andrus v. AgrEvo USA Co.*, 178 F.3d 395, 399 (5th Cir. 1999)(holding plaintiffs' state law claims were preempted because success on their claims would have necessarily had the effect of "imposing additional labeling standards").

in insisting that their claims are legitimately true "defective design."

However creative Petitioners' contentions may appear, they are no more than a disguised claim that Respondent failed to provide adequate warnings and instructions to alert Petitioners of certain dangers and the methods by which those dangers could be avoided. Although Petitioners argue that the design frustrated their "expectations" as consumers of the product, such expectations legitimately arise only when they are based upon information provided on the product's approved label. Because Petitioners' expectations are defined by the label, they also derive from the label's sufficiency as a source of necessary information.

FIFRA preempts state laws that either directly or indirectly impose different labeling requirements.[13] FIFRA's express preemption clause preempts claims if they would induce the pesticide manufacturer to alter its product label, irrespective of the particular cause of action asserted.[14] Petitioners cannot legitimately argue that their "consumer expectations" were frustrated by the herbicide's "defective" formula in this case. Legitimate "expectations" can only be defined by the product's label, not by vague notions conjured in hindsight after a purchase is concluded. When a warning label has been approved by the EPA, it would be "anomalous to hold that a consumer is entitled to expect a product to

[13] *MacDonald v. Monsanto*, 27 F.3d 1021, 1025 (5th Cir. 1994).

[14] *Worm v. American Cyanamid Co.*, 5 F.3d 744, 747 (4th Cir. 1993); *see also Andrus v. AgrEvo USA Co.*, 178 F.3d 395, 399 (5th Cir. 1999)(holding plaintiffs' state law claims were preempted because success on their claims would have necessarily had the effect of "imposing additional labeling standards").

perform more safely than government-mandated warnings indicate."[15] For that reason, FIFRA preempts "design defect" claims based upon allegedly frustrated "consumer expectations."[16] Any other holding "would represent an

[15] *Lescs v. William R. Hughes, Inc. ("Lescs II")*, 168 F.3d 482, 1999 WL 12913, at *12 (4th Cir. 1999) (citations and internal quotation marks omitted). *See also Oken v. Monsanto Co.*, 218 F. Supp. 2d 1361, 1366-67 (S.D. Fla. 2002) ("The objective expectation of the public regarding the dangerousness of a product necessarily involves consideration of the warning given to the public. Therefore, such design defect claims as Plaintiff brings under Florida law as to Dursban, a product regulated under FIFRA by the federal government, are preempted."); *accord, Ruiz-Guzman v. Amvac Chem. Corp.*, 243 F.3d 549, 2000 WL 1763212, at *1 (9th Cir. 2000) ("We agree with the district court that FIFRA preempts Washington's consumer expectation test." (citing *Papike*)); *Eriksen v. Mobay Corp.*, 41 P.3d 488, 494-95 (Wash. Ct. App. 2002) (FIFRA preempts Washington's consumer expectation test for design defect); *Dow Chem. Co. v. Ebling*, 723 N.E.2d 881, 910-922 (Ind. Ct. App. 2000) (Sharpnack, C.J., dissenting in part), *aff'd in part, rev'd in part*, 753 N.E.2d 633 (Ind. 2001) ("State tort law that permits recovery based on consumer expectations different from those that could be supported by the information required to be set forth on labels by FIFRA is in effect no different than state tort law that allows recovery for failure to make warnings different from or in addition to those set forth on the label."). *But see Arnold v. Dow Chem. Co.*, 110 Cal. Rptr. 2d 722, 743-45 (Cal. Ct. App. 2001).

[16] *Papike v. Tambrands, Inc.*, 107 F.3d 737, 743 (9th Cir. 1997) ("[Defendant's] warnings met the federal requirements and [plaintiff's] design defect claim therefore fails the "consumer expectation" test. To rule otherwise would allow the anomalous circumstance that a consumer is entitled to expect a product to perform more safely than its government-mandated warnings indicate."); *Haddix v. Playtex Family Prods. Corp.*, 138 F.3d 681, 686 (7th Cir. 1998) (same); *Akee v. Dow Chem. Co.*, 272 F. Supp. 2d 1112, 1132 (D. Haw. 2003); *Lescs v. Dow Chem. Co.* ("*Lescs I*"), 976 F. Supp. 393, 399 (W.D. Va. 1997), *aff'd sub nom. Lescs II*, 168 F.3d 482 (4th Cir. 1999), *cert. denied*, 528 U.S. 1119 (2000)("Plaintiff cannot proceed under a consumer expectations theory to show defective design because such a claim is preempted by FIFRA. . . . Like the product in *Papike*, Dursban is regulated by a federal legislative scheme which broadly preempts state claims based on federally approved

unwarranted end-run around federal preemption." [17] Accordingly, Petitioners' illusory "defective design" are preempted by FIFRA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Richard O. Faulk
Counsel of Record
Diana L. Panian
Gardere Wynne Sewell LLP
1000 Louisiana, Suite 3400
Houston, Texas 77002-5007
(713) 276-5500

Counsel for Amici Curiae
American Chemistry Council

November 2004

---

labeling. For this court to allow a claim of defective design based on consumer expectations would represent an unwarranted end-run around federal preemption. . . . [T]he court is of the opinion that this aspect of Plaintiff's claim of unreasonably dangerous design is preempted by FIFRA."); *Reece v. Good Samaritan Hosp.*, 953 P.2d 117, 123 (Wash. Ct. App. 1998) (same).

[17] *Lescs I*, 976 F. Supp. at 399.